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No. 06-549

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The Ninth Circuit in this case held that Section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. 1536(a)(2), overrides statutory mandates or constraints placed on an agency's discretion by other Acts of Congress. That holding is incorrect, because Section 7(a)(2) does not apply where the legal cause of any impacts on listed species is a mandate or constraint enacted by Congress, rather than discretionary action of an agency. See *Department of Transportation* v. *Public Citizen*, 541 U.S. 752, 769-770 (2004); Pet. 10-13. As both the panel majority and the six judges who dissented from denial of rehearing en banc recognized, the Ninth Circuit's holding conflicts with decisions of two other courts of appeals. Pet. App. 44a-45a, 46a-47a; see *id.* at 79a-81a (Kozinski, J., dissenting from denial of rehearing en banc). The holding also is of government-wide significance, because Section 7(a)(2) applies to all federal agencies. Review by this Court therefore is warranted.

A. The Question Presented Is Properly Before This Court

Respondents contend (Br. in Opp. 15-18) that the question on which the government seeks review—*i.e.*, whether Section 7(a)(2) of the ESA overrides statutory mandates or constraints imposed by other Acts of Congress—is not properly presented here because the relevant agencies' understanding of their legal obligations has changed during the course of the litigation. That is incorrect.

The biological opinion (BiOp) issued by the Fish and Wildlife Service (FWS) concluded that any harm to listed species that might occur after National Pollutant Discharge Elimination System (NPDES) permitting authority is transferred to the State of Arizona would not be *caused* by the administrative decision of the Environmental Protection Agency (EPA) to approve the transfer in accordance with the requirements of the Clean Water Act (CWA). Rather, the agencies' position was that any loss of protection to listed species resulting from the transfer of NPDES permitting authority to the State is properly attributable to the actions of *Congress* in (1) mandating such a transfer under Section 402(b) of the CWA if the specified criteria are satisfied, and (2) making Section 7(a)(2) of the ESA inapplicable to the actions of a state agency, such as the Arizona agency that would administer the NPDES program after the transfer at issue here. See Pet. 5, 11-12. The government has adhered to that position throughout this litigation.

The court of appeals recognized that "a negative impact on listed species is the likely direct or indirect effect of an agency's action only if the agency has some control over that result." Pet. App. 29a. The court held that the requisite control was present here because, in its view, Section 7 of the ESA itself provides an "affirmative grant of authority to attend to protection of listed species," even when particular protective measures would otherwise be forbidden by federal law. *Id.* at 34a; see *id.* at 38a-

39a. The court concluded on that basis that "EPA's transfer decision will cause whatever harm may flow from" the transfer of permitting authority to state officials. *Id.* at 48a. Because the court of appeals rejected the government's causation argument *on the merits*, that issue is properly before this Court.

As the petition for a writ of certiorari explains (at 21-26), EPA and FWS did not take the further position during the administrative proceedings that, because the consultation requirement imposed by Section 7(a)(2) of the ESA applies only to agency conduct that is subject to Section 7(a)(2)'s substantive no-jeopardy mandate, the causation analysis set forth in the FWS BiOp also meant that EPA was not required to consult about the transfer of NPDES permitting authority. The fact that EPA and FWS did not take that *further* step at an earlier stage of the case, however, presents no obstacle to this Court's review of the no-jeopardy issue the agencies *did* decide, on which the court of appeals rejected the agencies' conclusion. Moreover, because EPA *did* consult with FWS concerning the transfer decision, it was unnecessary for the court of appeals even to decide whether consultation was legally required. See Pet. App. 43a n.19. If the FWS's causation analysis is otherwise sound, EPA's now-superseded statements that it viewed itself as obligated to consult in the first instance do not cast doubt either on the legality of the NPDES transfer decision or on the suitability of the case for review by this Court. See Pet. 25-26.

B. The Court Of Appeals' Decision Is Erroneous

1. The CWA states that EPA "shall approve" a State's transfer application if specified criteria are met, see 33 U.S.C. 1342(b), and it is undisputed that Arizona's application satisfied those prerequisites, see Pet. App. 31a n.11. Respondents contend (Br. in Opp. 25) that the CWA and ESA may be harmonized by holding that EPA must *both* "apply the CWA criteria" *and* "insure" against jeopardy to listed species. But if

EPA denies (or places additional conditions upon) a state transfer application that satisfies the specified requirements of 33 U.S.C. 1342(b)(1)-(9), the agency is not "apply[ing]" the CWA at all, but rather is countermanding the express CWA directive that such applications "shall" be approved. See Pet. 9-10. In this circumstance, the CWA and EPA are properly reconciled by holding that EPA's approval of the state application pursuant to that statutory mandate does not "jeopardize" the listed species because it is not the legal cause of any harm to the species that may occur under the state permitting regime. See Pet. 10-13.

As the certiorari petition explains (at 12-13), the causation analysis in the FWS BiOp is strongly supported by this Court's subsequent decision in *Public Citizen*, which recognized that a federal agency "cannot be considered a legally relevant 'cause'" of harm that the agency lacks statutory authority to prevent. 541 U.S. at 770. Respondents contend (Br. in Opp. 28-29) that *Public Citizen* is irrelevant here because that case involved a statute (the National Environmental Policy Act (NEPA)) that imposes solely procedural requirements upon federal agencies. Respondents are correct that the substantive no-jeopardy mandate imposed by Section 7(a)(2) of the ESA has no analog in NEPA. Respondents do not explain, however, why that distinction between the two statutes bears on the question whether a transfer decision required by the CWA is properly regarded as the legal cause of any harm to listed species that may result from activities authorized by state NPDES permits after the transfer occurs. Indeed, the court of appeals concluded that, "[g]iven the similarity in the applicable regulations" under NEPA and the ESA, *Public Citizen* supplied the appropriate causation analysis for the ESA as well. Pet. App. 30a.

2. The certiorari petition explains (at 14-15) that, in the ESA as originally enacted in 1973, Section 7 directed that federal agencies not "utilize their authorities" in ways that would jeopardize listed species. Respondents do not dispute that,

under that language, Section 7's no-jeopardy mandate would not have required or authorized federal agencies to breach directives contained in other Acts of Congress. See Br. in Opp. 26. Respondents' position therefore necessarily depends on the premise that the 1978 amendments to the ESA significantly expanded the scope of the no-jeopardy mandate in a way that trumped competing statutory regimes. That premise is implausible in light of the sequence of events that preceded the 1978 amendments (see Pet. 16-17), and respondents identify no basis for concluding that the 1978 Congress intended that result.

As respondents observe (Br. in Opp. 26-27), if Section 7(a)(2) unambiguously superseded mandatory duties imposed by other federal statutes, the absence of pertinent legislative history would not be dispositive. However, the text of Section 7(a)(2) in its current form is at least ambiguous with respect to the question presented here, because the term "jeopardize" may reasonably be construed to apply only to decisions that are properly attributed to the relevant federal agency under the causation principles discussed above. See Pet. 13. In addition, the 1978 legislative history is not, as respondents suggest (see Br. in Opp. 27), silent on the question whether the amendments enacted that year were intended to expand the coverage of the no-jeopardy mandate. Rather, the Conference Report accompanying those amendments stated that the new subsection 7(a) "essentially restates section 7 of existing law." H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978). Thus, under Section 7(a)(2) in its current form, as under prior law, the obligation of an agency not to jeopardize a listed species is simply a particular (albeit mandatory) aspect of the more generalized provision for agencies to "utilize their authorities" in furtherance of the Act's purposes. See Pet. 16.[1]

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[1] Respondents contend (Br. in Opp. 27 & n.13) that the addition of an exemption procedure to Section 7 in the 1978 ESA amendments (see Pet. 16-17) supports their argument that the requirements of Section 7(a)(2) apply even

3. Respondents' reliance (Br. in Opp. 3-4, 13, 24-25) on *TVA* v. *Hill*, 437 U.S. 153 (1978), is misplaced. The Court in *Hill* simply found that continuing congressional appropriations for a dam that had been found to jeopardize an endangered species of fish did not constitute an implied repeal of Section 7 of the ESA. The Court emphasized that the appropriations for the dam "represented relatively minor components of the lump-sum amounts for the *entire* TVA budget." *Id.* at 189. The Court further explained that "[t]he Appropriations Acts did not themselves identify the projects for which the sums had been appropriated." *Id.* at 189 n.35.

Because the relevant Appropriations Acts *authorized* but did not *require* the Tennessee Valley Authority to put the Tellico Dam into operation, this Court had no occasion to consider the application of the ESA's no-jeopardy mandate to conduct required by another Act of Congress. The Court in *Hill* did not suggest that Section 7 of the ESA superseded an express statutory directive like that contained in Section 402(b) of the CWA. Indeed, any such holding would have been implausible under the version of Section 7 that was in effect when *Hill* was decided, which unambiguously identified the avoidance of jeopardy to listed species as simply one means by which federal

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where an agency is acting pursuant to an express statutory directive. The statutory language makes clear, however, that the exemption mechanism was not intended to address such situations. The ESA requires, *inter alia*, that an applicant for an exemption show that it has exhausted the consultation process and has "made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2) of this section." 16 U.S.C. 1536(g)(3)(A)(i). That requirement could not sensibly be applied to circumstances in which an agency is required by statute to take the proposed action. Thus, the statutory language confirms that subsection 7(g), like the rest of Section 7, was intended to apply only to the extent agencies can "utilize their authorities" to modify proposed actions or adopt alternatives thereto.

agencies were directed to "utilize their authorities in furtherance of the purposes of" the ESA. See Pet. 14; *Hill*, 437 U.S. at 160.[2]

C. The Decision Below Conflicts With Decisions Of Two Other Courts Of Appeals

As the certiorari petition explains (at 19-20), the Ninth Circuit's decision in this case conflicts with the rulings in *Platte River Whooping Crane Critical Habitat Main. Trust* v. *FERC*, 962 F.2d 27 (D.C. Cir. 1992) (*Platte River*), and *American Forest & Paper Ass'n* v. *EPA*, 137 F.3d 291 (5th Cir. 1998) (*American Forest*). Respondents contend (Br. in Opp. 18-22) that no direct conflict exists because the courts in *Platte River* and *American Forest* (1) did not specifically address the proper treatment of situations in which compliance with a statutory mandate would jeopardize a listed species, and (2) relied in part on the language of Section 7(a)(1) of the ESA, which directs federal agencies to "utilize their authorities" to effectuate the Act's purposes. 16 U.S.C. 1536(a)(1). Respondents' argument is incorrect. Indeed, the Ninth Circuit itself acknowledged the circuit conflict, stating that the courts in *Platte River* and *American Forest* had

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[2] As the certiorari petition explains (at 18), the court of appeals' decision in this case is inconsistent with 50 C.F.R. 402.03, which reflects the longstanding view of FWS and the National Marine Fisheries Service that Section 7 of the ESA does not supersede other legal constraints on agency discretion. Respondents suggest (Br. in Opp. 27-28) that Section 402.03 is irrelevant here because the government disclaimed reliance on that regulation in the court of appeals. The Ninth Circuit, however, did not treat the government's silence on this point as a reason for declining to address the meaning of the regulation. To the contrary, the court announced its construction of the regulation, which directly parallels the court's conclusion that Section 7(a)(2) of the ESA overrides mandatory directives in other statutes, and which is flatly inconsistent with that of the federal agencies that administer 50 C.F.R. 402.03 and are responsible for its promulgation. Pet. App. 39a-44a; see Pet. 18; Pet. App. 103a-116a. That holding concerning the meaning of the regulation is binding circuit precedent, and, like the statutory holding on which it is premised, should not be permitted to stand.

"conclud[ed] that section 7 does not itself authorize agencies to protect listed species even when it is their own action that is jeopardizing them." Pet. App. 44a; see *id.* at 44a-45a, 46a-47a; accord *id.* at 79a-81a (Kozinski, J., dissenting from denial of rehearing en banc).

The petitioner in *Platte River* relied on Section 7(a)(2) of the ESA, see 962 F.2d at 33, and the District of Columbia Circuit quoted that provision as well as Section 7(a)(1), see *id.* at 33-34. The court did not limit its holding to Section 7(a)(1), but rather stated broadly that "the statute directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act." *Id.* at 34. In finding this Court's decision in *Hill* to be inapposite, moreover, the court in *Platte River* did not distinguish between Section 7(a)(1) and Section 7(a)(2), but simply noted that the Court in *Hill* "did not even consider whether section 7 allows agencies to go beyond their statutory authority to carry out the purposes of the ESA." *Ibid.*

The conflict with *American Forest* is particularly clear because that case involved the application of Section 7(a)(2) to the very category of agency action—EPA transfers of NPDES permitting authority under the CWA—that is at issue here. In *American Forest*, the Fifth Circuit specifically referred to Section 7(a)(2), see 137 F.3d at 298, 299, in broadly holding that "the ESA serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their *existing* authority in a particular direction," *id.* at 299. For that reason, the court stated, "EPA cannot invoke the ESA as a means of creating and imposing requirements that are not authorized ' the CWA." *Ibid.* Here, by contrast, the clear holding of the court of appeals is that the ESA *can* be the source of extra-CWA prerequisites to the approval of a state NPDES application. See Pet. App. 34a, 38a-39a; see also *id.* at 87a n.2 (Berzon, J., concurring in denial of petition for rehearing en banc) (stating

that the ESA "*adds* one requirement to the list of considerations under the [CWA] permitting transfer provision").

D. This Case Presents A Question Of Substantial Legal And Practical Importance

As the certiorari petition explains (at 21), this case raises an issue of substantial legal and practical importance because Section 7(a)(2) applies to *all* federal agencies. Respondents contend (Br. in Opp. 23-24) that this Court's review is unwarranted because Congress can exempt particular categories of agency conduct from Section 7(a)(2)'s coverage. Of course, in the view of EPA and FWS, Congress already has done that by making the transfer of NPDES permitting authority to a State mandatory when the specified criteria are satisfied. More broadly, under respondents' rationale, this Court would never resolve questions of statutory interpretation because Congress always retains authority to correct lower courts' misunderstandings of federal legislation.

Respondents also suggest (Br. in Opp. 24 n.10) that the question presented is of limited practical importance because the court of appeals' holding applies by its terms only when a federal agency "engages in an affirmative action." Pet. App. 38a. Even with that limitation, however, the court's ruling encompasses a broad range of agency conduct. That is particularly so because the "affirmative action[s]" to which the Ninth Circuit's holding applies include not only ground-disturbing actions undertaken directly by federal personnel, but also *administrative* actions like the transfer of NPDES permitting authority at issue in this case from EPA to a state agency.

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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